

# IMMIGRANT WORKERS AND THE DOMESTIC ENFORCEMENT OF INTERNATIONAL LABOR RIGHTS

Michael J. Wishnie†

Globalization poses many challenges to working people and their advocates. The erosion of barriers to international trade and investment has increased the mobility of goods and capital, but restrictions on the free movement of workers have endured. As a result, there is a pressing need for upward harmonization of labor rights across borders,<sup>1</sup> the further definition of international labor standards and development of mechanisms to enforce them,<sup>2</sup> and crucially, support for international and cross-border

---

† Associate Professor of Clinical Law, New York University School of Law. Portions of this paper were presented at the University of Pennsylvania Journal of Labor & Employment Law's Annual Symposium and the 54th Annual Conference on Labor Law at New York University. I am grateful for the comments of Sameer Ashar, Muzaffar Chishti, Lance Compa, and Nancy Morawetz. I would also like to thank Jonathan Rosen for able research assistance. I gratefully acknowledge the financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law.

1. See, e.g., Stephen Herzenberg, *In from the Margins: Morality, Economics, and International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 99-114 (Lance A. Compa & Stephen F. Diamond eds., 1996) (presenting strategies for upward harmonization of labor standards).

2. It has been widely noted that the International Labor Organization lacks any meaningful enforcement procedures. See, e.g., Lance A. Compa, *The First NAFTA Labor Cases: A New International Labor Rights Regime Takes Shape*, 3 U.S.-MEX. L.J. 159, 160 (1995) ("[T]he ILO has no sanctioning power . . . . It must rely on behind-the-scenes dialogue, embarrassing publicity or other forms of moral force to persuade labor rights violators to change their conduct."); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 63 (2001) (stating that ILO has "no enforcement powers . . . [and] no sanctions other than 'jaw boning,' which many violators regularly ignore"). The United States has also imposed unilateral labor conditions on certain trade and investment regimes. See, e.g., Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 6 (2001) (analyzing the use of unilateral conditions in trade and investment statutes and concluding that "economic sanctions have an importance beyond their classical role in seeking to punish and alter a foreign state's behavior—that of assisting in the international definition, promulgation, recognition, and domestic internalization of human rights norms."). These

organizing initiatives.<sup>3</sup> In light of the demands on the limited resources of United States unions and other labor advocates, it may seem folly to suggest an additional strategy for addressing the consequences of globalization. Yet there is a further method of advocacy, one that is relatively low-cost but could both advance the direct interests of some of the most exploited workers in this country and aid broader international labor rights initiatives: enforcement of international labor standards in the United States, particularly on behalf of immigrant workers.

There are unfortunately numerous instances in which government policies or private employer practices in the United States violate international labor law.<sup>4</sup> In this Article I outline two specific strategies that labor advocates should consider incorporating into their existing efforts on behalf of working people in the United States. The first is federal litigation on behalf of immigrant workers for violations of international labor law, pursuant to the Alien Tort Claims Act ("ATCA")<sup>5</sup> The second is challenging United States under-enforcement of existing labor rights and standards by invocation of the international consultative and arbitration processes established by the labor side-agreement to the North American

---

measures have been opposed by business interests, as well as criticized as unilateral and interventionist by leading human rights scholars. See Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"?*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE, 71, 72 (Lance A. Compa & Stephen F. Diamond eds., 1996). Initiatives to define and enforce international labor standards have also been rightfully condemned as ineffectual. See, e.g., HUMAN RIGHTS WATCH, *TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT* (2001) [hereinafter *TRADING AWAY RIGHTS*] (criticizing labor side agreement); Cleveland, *supra*, at 3 ("[I]nternational mechanisms for [labor norm] enforcement remain underdeveloped.").

3. See, e.g., David Montgomery, *Labor Rights and Human Rights: A Historical Perspective*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 13, 18-21 (Lance A. Compa & Stephen F. Diamond eds., 1996) (reviewing history of and emphasizing need for international labor solidarity); Lance Compa, *NAFTA's Labor Side Accord: A Three-Year Accounting*, 3 NAFTA: L. & BUS. REV. AM. 6, 21-22 (1997) (describing cross-border organizing initiatives before and after the adoption of NAFTA); Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 102 (1999) ("It is ironic, but perhaps not accidental, that as union strength is declining at the national level, national unions are making more efforts than ever to develop international ties and cross-border strategies.").

4. See, e.g., HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* (2001) (documenting violations in the United States of international guarantees of freedom of association and right to organize); HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES* (2001) [hereinafter *HIDDEN IN THE HOME*] (documenting violations of international prohibitions on involuntary servitude and forced labor in treatment of certain domestic workers employed by diplomats and international officials in United States).

5. 28 U.S.C. § 1350 (2001) (establishing the right of action and federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

Free Trade Agreement ("NAFTA"), known formally as the North American Agreement for Labor Cooperation ("NAALC").<sup>6</sup>

Both strategies are worthy of consideration because they may further the campaign-specific goals of individual workers, unions, and other labor organizations, but also for the independent reason that each will compel United States judicial and executive-branch institutions to measure public and private domestic labor practices against international standards. Such a process can contribute to what has been termed "norm internalization."<sup>7</sup> Moreover, embracing either strategy may enable United States labor advocates to "lead by example" in taking international labor standards seriously and demanding that United States public and private institutions honor our nation's international obligations. This, in turn, may offer a potentially useful response to those who oppose further definition and development of international labor norms and who criticize the movement as concerned solely with protecting domestic labor markets in advanced industrial nations.<sup>8</sup>

Part I of this paper considers the potential for ATCA litigation to further the interests of non-citizen workers in this country, while simultaneously contributing to "norm internalization" by forcing federal courts (and perhaps the Justice Department and the media as well) to evaluate domestic practices against international standards.<sup>9</sup> Part II turns to petitions under the NAALC. After summarizing the NAALC's dispute resolution procedures, it analyzes two little-examined petitions that have challenged an information-sharing agreement between the United States Department of Labor ("DOL") and the United States Immigration and Naturalization Service ("INS") and delays in claim adjudications by the New York Workers' Compensation Board. This Part concludes by

---

6. North American Agreement for Labor Cooperation, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

7. Cleveland, *supra* note 2, at 6 (defining norm internalization as "process by which nations incorporate international law concepts into their domestic practice . . . through repeated interactions between states and a variety of domestic and transnational actors, which produce interpretations of applicable global norms and ultimately the internalization of those norms into states' domestic values and processes"); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (explaining how the process of norm internalization is central to understanding why nations follow international law). See also Harry Arthurs, *Reinventing Labor Law for the Global Economy*, 22 BERKELEY J. EMP. & LAB. L. 271, 286-91 (2001).

8. Stephen S. Golub, *Are International Labor Standards Needed to Prevent Social Dumping?*, FIN. & DEV., Dec. 1997 (proposing that the establishment of international labor standards may serve protectionist goals); Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkage for the WTO's Future*, 24 FORDHAM INT'L L.J. 608, 639 n.104 (2000) ("U.S. proposals can convey more of a trade protectionist than an internationalist human rights concern.").

9. See *infra* notes 11-68 and accompanying text.

considering additional uses of the NAALC petition process in furthering domestic labor initiatives and encouraging the development of international labor norms.<sup>10</sup>

I do not wish to overstate the potential utility of either ATCA litigation or NAALC petitions directed at United States domestic labor practices. Plainly there are substantial limitations on the immediate and long-term objectives that can be achieved from each. Nevertheless, both strategies could have important, concrete benefits for specific labor campaigns in this country, and meaningfully contribute to more long-term efforts to develop and enforce international labor standards.

## I. LABOR RIGHTS LITIGATION UNDER THE ALIEN TORT CLAIMS ACT

One overlooked vehicle for enforcing international labor rights violations committed in the United States is the ATCA. The statute traces its origins to the first Judiciary Act of 1789<sup>11</sup> and has enjoyed a late-twentieth century renaissance as the touchstone of transnational human rights litigation brought in the United States.<sup>12</sup> To date, human rights advocates have utilized the ATCA principally as a means to challenge human rights violations committed abroad. Courts have recognized ATCA claims for torture, genocide and war crimes, summary execution, disappearance, arbitrary detention, and cruel, inhuman or degrading treatment<sup>13</sup>—as well as for violations of international prohibitions on forced labor and involuntary servitude.<sup>14</sup> In several recent cases, however,

---

10. See *infra* notes 69-149 and accompanying text.

11. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76 (1789). On the history of the provision, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996).

12. See generally BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996) (analyzing ATCA litigation); Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1561 n.131 (1998) (summarizing recent ATCA cases).

13. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (holding that victims from Bosnia-Herzegovina sufficiently alleged violations of international law and law of war for purposes of the ATCA), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) (granting jurisdiction under the ATCA in a suit against the former Philippines president for torture, summary execution, and murder); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (establishing that expatriot citizens of Guatemala had a cause of action against the former Minister of Defense under the ATCA for acts of brutality committed by Guatemalan military forces); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (concerning a suit brought under the ATCA by Haitian citizens against a former military ruler for torture and false imprisonment); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (establishing that the ATCA provided a cause of action for Argentine citizens seeking damages against a former Argentine general for actions including torture, murder, and prolonged arbitrary detention).

14. See *In re: World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d

workers have sought to use the ATCA to further domestic labor organizing initiatives and to redress individual labor violations committed within the United States.<sup>15</sup>

#### A. *The Scope of Labor Law Violations Enforceable Under ATCA*

ATCA establishes a cause of action and federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>16</sup> The statute was rarely used before its revival by the Second Circuit in 1980 in a landmark human rights case arising in Paraguay.<sup>17</sup> Since 1980, human rights lawyers and activists have used the ATCA to press claims for violations of international law in numerous cases brought by non-citizens suing in tort, typically involving core human rights claims of torture, genocide, and war crimes.<sup>18</sup>

---

1160, 1179 (N.D. Cal. 2001) (holding that forced labor allegations by Chinese and Korean workers state a claim under ATCA, but dismissing claims as time-barred); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445-46 (D.N.J. 1999) (holding the same, as to slave labor claims brought under ATCA against German subsidiary of Ford Motor Co.); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (holding Burmese pipeline workers alleging forced labor and slavery stated a claim under ATCA).

15. *Doe v. The Gap, Inc.*, No. 01 Civ. 0031, slip op. at 51-53 (D.N. Mar. I. Nov. 26, 2001) (involving ATCA allegations of involuntary servitude and violations of right to associate and be free of discrimination by garment workers in Saipan); *Manliguez v. Joseph*, No. 01 Civ. 7574 (E.D.N.Y. filed Nov. 13, 2001) (involving the same, by a former domestic worker from the Philippines employed in private home); *Hikabanze v. Shamapande*, No. 00 Civ. 9712 (S.D.N.Y. filed Dec. 22, 2000) (involving an ATCA allegation of involuntary servitude by former domestic worker from Zambia employed in the private home of a United Nations official); *Okezie v. Udogwu*, No. 99 Civ. 3345 (S.D.N.Y. May 7, 1999) (concerning the same, by a former domestic worker from Nigeria employed in a private home). See also Michael Cooper, *Woman in Child Servitude Case Faced a Neglect Complaint in 1988*, N.Y. TIMES, July 16, 1999, at B1 (describing ATCA allegations of involuntary servitude in *Okezie* litigation). I have served as co-counsel for the workers in *Hikabanze*, *Okezie*, and *Manliguez*, *supra*, as well as those in *United States v. Paoletti-Lemus*, *infra* note 52, *Montero v. INS* *infra* note 146, “Mina Das” and *Gurbachan Juneja*, *infra* note 60, and the petitioners in Mexico NAO 98-04 and Mexico NAO 01-01, *infra* notes 95-132 & accompanying text.

16. 28 U.S.C. § 1350 (2001).

17. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the ATCA provides federal jurisdiction in a claim against a Paraguayan official by the estate of a torture and murder victim). The D.C. Circuit subsequently adopted a somewhat narrower view of the statute. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (dismissing an action brought under the ATCA by survivors of persons murdered in an attack on a civilian bus in Israel). However, Congress confirmed the Second Circuit’s approach by enacting the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

18. See, e.g., *Kadic*, 70 F.3d at 232 (concerning genocide, rape, torture in former Yugoslavia); *Xuncax*, 886 F. Supp. at 162 (involving torture in Guatemala); *Paul*, 812 F. Supp. at 207 (involving torture in Haiti); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (involving murder, torture, rape, and terrorism in Zimbabwe); *Estate of*

Nearly all modern ATCA litigation has challenged conduct committed outside the United States, but nothing in the text, history, or purpose of the statute imposes any such limitation, and the only court yet to issue an opinion on the viability of an ATCA claim arising in the United States held that nothing in the statute restricts its application to human rights violations committed extraterritorially.<sup>19</sup> In fact, litigation of torts committed in the United States would avoid two of the common objections often raised to ATCA claims arising abroad, namely the doctrine of *forum non conveniens*<sup>20</sup> and the requirement of establishing personal jurisdiction over the defendants.<sup>21</sup> Neither difficulty is likely to arise in litigation concerning torts committed in the United States.

One issue that may arise in ATCA challenges to labor abuses concerns the applicability of international law to private employers. Although much of international law is directed at the regulation of states, the dearth of ATCA challenges to international law violations by private parties is no barrier to such claims. In fact, some international law norms regulate private as well as public behavior. Decisions authored by the U.S. Court of Appeals for the Second Circuit and Judge Harry Edwards of the D.C. Circuit, as well as by various district courts, have recognized that litigants may use ATCA to enforce those international norms which apply to private actors.<sup>22</sup> The Second Circuit has expressly rejected the view that “the law

---

Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D.Fla. 2001) (involving extrajudicial killing, torture, crimes against humanity in Chile); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (involving torture in Ethiopia).

19. See *Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998) (refusing to dismiss ATCA claims by INS detainees against government officials and contractors). In *Doe v. The Gap*, the court dismissed the ATCA claims on behalf of Saipan garment workers for failing to allege sufficient facts, without commenting on the propriety of an ATCA claim arising in the United States. *Doe v. The Gap, Inc.*, No. 01 Civ. 0031, slip op. at 51-53 (D. N. Mar. 1. Nov. 26, 2001).

20. See Cleveland, *supra* note 12, at 1576 (noting that defendants in ATCA litigation arising abroad may invoke the doctrine of *forum non conveniens*, but concluding that doctrine is “surmountable”). Cf. *Aguinda v. Texaco*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001) (dismissing ATCA claim on *forum non conveniens* grounds).

21. Cleveland, *supra* note 12, at 1575 (noting personal jurisdiction rules can create “procedural hurdles” to ATCA litigants).

22. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (reversing dismissal of ATCA claims for torture, imprisonment and killings, allegedly performed by Nigerian authorities at the instigation of private oil companies); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that individuals may be liable for piracy and slave-trading under ATCA); *Bao Ge v. Li Peng*, Civ. No. 98-1986, 2000 U.S. Dist. LEXIS 12711, at \*17 n.5 (D.D.C. Aug. 28, 2000) (“[T]he Court will accept the Second Circuit’s conclusion that ATCA jurisdiction extends to private parties for egregious acts of misconduct.”); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (holding that non-state actors may be liable for slavery and forced labor under ATCA, but granting summary judgment for defendants on facts of the case); *Iwanowa v. Ford Motor Co.*, 67 F.

of nations, as understood in the modern era, confines its reach to state action.”<sup>23</sup> Instead, the court held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”<sup>24</sup> Scholarly commentary endorses the view that “international prohibitions of slavery, servitude, and forced labor apply to state actors and private entities alike.”<sup>25</sup>

The international law definitions of slavery, servitude, and forced labor are capacious enough to protect some workers in the United States from contemporary forms of exploitation.<sup>26</sup> “Slavery” is the practice of holding human beings as chattel, denying their legal personhood.<sup>27</sup> The prohibitions on “servitude” or “slave-like practices” extend further to bar debt bondage, serfdom, forced marriage, and the sale of children into labor, terms that do not require evidence of involuntariness on the part of the worker.<sup>28</sup> “Forced labor” refers to “all work or service which is exacted

---

Supp. 2d 424, 445-46 (D.N.J. 1999) (holding that non-state actor may be liable for a forced labor claim under ATCA but dismissing on other grounds); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (denying motion to dismiss and holding that non-state actors may be liable for slavery and forced labor under ATCA).

23. *Kadic*, 70 F.3d at 239.

24. *Id.* (listing prohibitions on piracy, slave trade, and certain war crimes as examples of international law regulation of private conduct); *id.* at 243 (noting that individuals may also be liable for torture or summary execution when done in the course of genocide or as war crime).

25. Cleveland, *supra* note 12, at 1564-69 (stating that the language of ATCA “does not limit defendants to natural persons or state officials, and courts have heard claims against private individuals, corporations, and associations”); Douglas S. Morrin, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Tort Claims Act*, 20 B.C. THIRD WORLD L.J. 427 (2000) (describing how the ACTA has become a way to promote corporate accountability abroad); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT’L L. 303 (1999) (tracing the development of customary international law prohibition on slavery and the slave-trade).

26. See generally HIDDEN IN THE HOME, *supra* note 4, at 50-51 (reviewing international law definitions of and instruments regarding slavery, servitude, and forced labor); Cleveland, *supra* note 12, at 1569-70 (parsing terms).

27. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, art. 1(1), 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention] (defining “slavery” as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”).

28. See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 [hereinafter 1957 Supplementary Convention].

Debt bondage [is] . . . the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

*Id.* at art. 1(a), 18 U.S.T. at 3204, 266 U.N.T.S. at 41.

from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>29</sup> Slavery, servitude, and forced labor are now banned by numerous international instruments,<sup>30</sup> and public and private violations of the prohibitions are fully enforceable under ATCA, as the courts to consider the question have uniformly held.<sup>31</sup>

United States domestic law also prohibits slavery, servitude, and forced labor, as well as peonage and debt bondage.<sup>32</sup> The judiciary has been reluctant to recognize a private right of action to enforce these constitutional and statutory prohibitions against non-governmental defendants, however.<sup>33</sup> In addition, in *United States v. Kozminski*,<sup>34</sup> the Supreme Court narrowly interpreted the statutory term “involuntary

Serfdom [is] the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.

*Id.* at art. 1(b), 18 U.S.T. at 3204-05, 266 U.N.T.S. at 41.

29. Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55, 58 (entered into force May 1, 1932) [hereinafter ILO Forced Labor Convention].

30. In addition to the 1926 Slavery Convention, *supra* note 27, the 1957 Supplementary Convention, *supra* note 28, and the ILO Forced Labour Convention, *supra* note 29, these include the ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1238 (1998); the African Charter of Human and People's Rights, June 27, 1981, art. 5, 21 I.L.M. 59, 60 (1981); the American Convention on Human Rights, Nov. 22, 1969, art. 6, 1144 U.N.T.S. 144, 146, 9 I.L.M. 99, 103; the International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 8, 999 U.N.T.S. 171, 175, 6 I.L.M. 368, 371; the European Social Charter, Oct. 18, 1961, art. 1, 529 U.N.T.S. 89, 94; the Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291; the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; and the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 4, 213 U.N.T.S. 221, 224-27.

31. *Supra* notes 22-24.

32. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); 18 U.S.C. § 1581 (2001) (prohibiting peonage); 18 U.S.C. § 1584 (2001) (prohibiting involuntary servitude); 18 U.S.C. § 1589 (2001) (prohibiting forced labor); 42 U.S.C. § 1994 (2001) (providing for a civil prohibition of peonage). For a recent analysis of the development of peonage laws in this country, see Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001).

33. See, e.g., *Doe v. The Gap, Inc.*, No. 01 Civ. 0031, slip op. at 41-43 (D. N. Mar. I. Nov. 26, 2001); *Turner v. Unification Church*, 473 F. Supp. 367, 373-74 (D.R.I. 1978) (declining to recognize right of action against private defendant under the Thirteenth Amendment), *aff'd*, 602 F.2d 458 (1st Cir. 1979). But see *City of Memphis v. Greene*, 451 U.S. 100, 124 (1981) (recognizing private right of action against government defendants under Thirteenth Amendment); *Terry Properties, Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1534 (11th Cir. 1986) (recognizing private right of action against private defendant under Thirteenth Amendment).

34. 487 U.S. 931 (1988).



servitude” as requiring not only proof of psychological coercion, but also proof of physical or legal coercion.<sup>35</sup> The Court’s interpretation is inconsistent with international law.<sup>36</sup> It has also drawn the critical attention of Congress, which in 2000 rejected the *Kozminski* analysis,<sup>37</sup> enacted a new criminal prohibition on “forced labor” short of the *Kozminski* Court’s narrow interpretation of involuntary servitude,<sup>38</sup> and incorporated a more expansive definition of “involuntary servitude” into new anti-trafficking and immigration provisions.<sup>39</sup>

Nevertheless, even in applying a restrictive construction of the statutory term “involuntary servitude,” courts have agreed on several principles that confirm the possible utility of ATCA claims for a substantial number of immigrant workers in this country. First, courts have emphasized that “physical restraint” is not a required element of a claim for involuntary servitude, because compulsion can be demonstrated by establishing the actual or threatened use of physical or legal coercion.<sup>40</sup> Second, even before Congress criminalized “forced labor” and embraced a more expansive definition of “involuntary servitude” in anti-trafficking laws,<sup>41</sup> Justice O’Connor wrote for the Supreme Court that “it is possible that threatening . . . an immigrant with deportation could constitute the

---

35. *Id.* at 949-52.

36. Joey Asher, Comment, *How the United States is Violating Its International Agreements to Combat Slavery*, 8 EMORY INT’L L. REV. 215, 219-20 (1994) (arguing that United States courts have construed involuntary servitude statutes overly narrowly, in violation of United States obligations under international law).

37. Trafficking Victims Protection Act, Pub. L. No. 106-386, § 102(b)(13), 114 Stat. 1466 (2000) (codified at 22 U.S.C. § 7101(b)(13) (2001)).

38. Trafficking Victims Protection Act, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1486-87 (2000) (codified at 18 U.S.C. § 1589 (2001)).

39. Trafficking Victims Protection Act, Pub. L. No. 106-386, § 102(b)(6), (13), 114 Stat. 1466-67 (2000) (codified at 22 U.S.C. § 7101(b)(6), (13) (2001)) (recognizing in legislative findings that “psychological abuse” and “nonviolent coercion” can constitute involuntary servitude); Trafficking Victims Protection Act, Pub. L. No. 106-386, § 103(2), (5), 114 Stat. 1469 (2000) (codified at 22 U.S.C. § 7102(2), (5) (2001)) (defining “coercion” and “involuntary servitude” for trafficking provisions).

40. *Kozminski*, 487 U.S. at 947; *United States v. Alzanki*, 54 F.3d 994, 1000 (1st Cir. 1995) (“The government need not prove physical restraint” in involuntary servitude prosecution); *United States v. King*, 840 F.2d 1276, 1278-81 (6th Cir. 1988) (affirming conviction of cult leaders despite lack of physical barriers); *United States v. Warren*, 772 F.2d 827, 834 (11th Cir. 1985) (holding that in migrant labor camp, “[t]hat the worker had the opportunity to escape is of no moment, if the [employer] has placed him in such fear of physical harm that he is afraid to leave”); *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977) (holding that placing a person “in such fear of physical harm that the victim is afraid to leave, regardless of the victim’s opportunities for escape,” supports a finding of involuntary servitude).

41. Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1466 (codified at 22 U.S.C. § 7101(b)(13) (2001)).

threat of legal coercion that induces involuntary servitude.”<sup>42</sup> Accordingly, even if United States courts were to apply the more restrictive criminal-law definition of “involuntary servitude,”<sup>43</sup> they would properly conclude that non-citizens forced to labor under the threat of deportation might state an ATCA claim for a violation of international law prohibitions on involuntary servitude.

### B. *Illustrative Uses of the ATCA*

By the terms of the statute, ATCA will be directly useful only to non-citizen workers. Nevertheless, workers and their advocates could make fuller use of ATCA to advance domestic labor struggles. There may be as many as eleven million undocumented immigrants in the United States today,<sup>44</sup> many of whom work long hours for low pay in dangerous conditions. There are millions more legal immigrant workers.<sup>45</sup> All of these workers are capable of bringing claims under ATCA. Moreover, any strategy that improves the circumstances of low-wage immigrant workers is likely to have a positive effect on the terms and conditions of employment of both their immediate colleagues and other workers.

There has been some ATCA litigation presenting claims of forced labor and involuntary servitude committed outside the United States.<sup>46</sup> A

---

42. *Kozminski*, 487 U.S. at 948. See also *Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 946 (5th Cir. 1999) (reversing a 28 U.S.C. § 1915(d) dismissal of involuntary servitude claim by *pro se* litigant, alleging the INS and FBI coerced him “on several occasions with threats of deportation if he did not continue to work for them.”); *Alzanki*, 54 F.3d at 1004-05 (finding employer threats of deportation among evidence supporting a conviction for holding domestic employee in involuntary servitude); *Kimes v. United States*, 939 F.2d 776, 778 (9th Cir. 1991) (affirming conviction for involuntary servitude in part based on evidence of threats of deportation).

43. But see *Asher*, *supra* note 36, at 219-20; *Cleveland*, *supra* note 12, at 1578-79.

44. Cindy Rodriguez, *Census Bolsters Theory Illegal Immigrants Undercounted*, BOSTON GLOBE, Mar. 20, 2001, at A4 (reporting that government and academic estimates of the undocumented population range from six to eleven million persons).

45. INS estimates that there are more than ten million legal permanent residents in the United States, as well as thousands of non-immigrants present on temporary visas for purposes such as travel, business, study, and employment. See Immigration and Naturalization Service, *State Population Estimates: Legal Permanent Residents and Aliens Eligible to Apply for Naturalization*, available at <http://www.ins.usdoj.gov/graphics/aboutins/statistics/1prest.htm> (last visited July 17, 2001).

46. See cases cited *supra* note 14. See also *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1308-09 (C.D. Cal. 2000) (approving ATCA claim for violation of international law prohibitions on forced labor and involuntary servitude by Burmese workers against pipeline operator and government authorities, but granting summary judgment for defendant on facts of case); *Sinaltrainal v. Coca-Cola, Inc.*, No. 35-18 (S.D. Fla.) (complaint filed July 20, 2001) (stating ATCA claims on behalf of Colombian trade unionists alleging murder, torture, kidnapping, unlawful detention, and violations of right to associate and organize, all committed in Columbia).

small number of cases have also alleged ATCA claims for international labor violations committed within the United States. Of the latter, several have been involuntary servitude claims asserted by immigrant domestic workers employed in the United States and forced to work for little or no pay under threat of deportation or physical violence.<sup>47</sup> Another, still pending, involves claims by garment workers employed in Saipan.<sup>48</sup>

Together, these domestic cases raise the possibility that more immigrant workers may press claims for violations of international labor law, including claims of forced labor<sup>49</sup> committed in this country,<sup>50</sup> by private actors.<sup>51</sup> In light of the extreme coercion to which many undocumented workers are subjected, including employer threats to contact INS or, in some cases, physical restraint of workers,<sup>52</sup> ATCA litigation of labor violations may afford non-citizen workers broader remedies than those otherwise available under domestic labor and employment statutes.

Prospects for ATCA litigation are even more apparent when one considers the growth of organizing initiatives in immigrant communities and workplaces in the last decade. Many of these initiatives have been led by grassroots worker centers that arose in communities long overlooked by the organized labor movement and government enforcement agencies,<sup>53</sup>

47. See, e.g., *Manliguez v. Joseph*, No. 01 Civ. 7574 (E.D.N.Y. filed Nov. 13, 2001); *Hikabanze v. Shamapande*, No. 00 Civ. 9712 (S.D.N.Y. filed Dec. 22, 2000); *Okezie v. Udogwu*, No. 99 Civ. 3345 (S.D.N.Y. May 7, 1999).

48. *Doe v. The Gap, Inc.*, No. 00 Civ. 0031, slip op. at 51-53 (D. N. Mar. I. Nov. 26, 2001) (dismissing ATCA claims in class action litigation by garment workers in Saipan for failure to allege facts sufficient to establish involuntary servitude and on grounds that violations of right to associate and to be free of discrimination are not actionable under ATCA).

49. See *In re: Japanese Forced Labor Litigation*, 164 F.Supp. 2d at 1179; *Unocal Corp.*, 963 F. Supp. at 891-92; *Iwanowa*, 67 F. Supp. 2d at 440.

50. See *Jama v. INS*, 22 F. Supp. 2d 353, 358-60 (D.N.J. 1998) (describing abuse of INS detainees).

51. See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Unocal Corp.*, 110 F. Supp. 2d at 1308-09.

52. See, e.g., Laura Ho, Catherine Powell & Leti Volpp, *(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 383-84 (1996) (describing Thai garment workers confined in an apartment complex in El Monte, California); *Indictment, United States v. Paoletti-Lemus, et al.*, No. 97 Crim. 768 (E.D.N.Y. 1997) (describing a conspiracy to hold deaf Mexican peddlers in involuntary servitude in New York and Chicago); Complaint, *Okezie*, No. 99 Civ. 3345 (describing a Nigerian woman held in involuntary servitude as a domestic worker in Bronx, New York).

53. See, e.g., Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428-50 (1995) (discussing worker center movement and experience of The Workplace Project in Hempstead, New York); Bob Port, *Smuggling Debts Bring Servitude: Immigrants Work 100 Hours a Week to Pay Loanshark*, N.Y. DAILY NEWS, July 9, 2001, at 4 (describing activities of Chinese Staff & Worker Association in New York); Robin Haas, *Uniting on the Domestic Front*, NEWSDAY, Dec. 18, 2000, at A27 (describing efforts of

although the AFL-CIO has also demonstrated a growing activism in low-wage immigrant workforces.<sup>54</sup> Because these campaigns frequently involve litigation by individual workers, and because many of the workers are non-citizens, depending on the facts in the individual cases, ATCA claims may be included in lawsuits already planned in the service of larger organizing goals.

One area in which ATCA litigation may be able to make a special contribution is campaigns on behalf of domestic workers. There may be more than one million domestic workers in the United States today.<sup>55</sup> Domestic workers frequently work alone and are statutorily excluded from the National Labor Relations Act.<sup>56</sup> Thus, efforts to organize this workforce by the mainstream labor movement have been negligible.<sup>57</sup> Yet their vulnerability has exposed these workers to some of the most extreme forms of labor exploitation in the United States today,<sup>58</sup> and has prompted independent domestic worker organizing efforts.<sup>59</sup> To a large extent,

---

Workers' Awaaz in Jackson Heights, Queens to organize South Asian domestic workers); Adam Geller, *No Longer Silent: Domestic Workers Tell of Exploitation*, THE REC. OF N. N.J., May 28, 2000, at A1 (discussing work of Andolan, a South Asian worker center in New York); Joyce Wadler, *An Unlikely Organizer as Cabdrivers Unite*, N.Y. TIMES, Dec. 8, 1999, at B2 (describing the work of New York Taxi Workers' Alliance).

54. See, e.g., AFL-CIO Statement of the Executive Council (February 16, 2000), available at <http://www.aflcio.org/publ/estatemnts/feb2000/immigr.htm> (calling for a repeal of employer sanction provisions of immigration laws, enactment of "whistleblower" protections for immigrants who report labor violations, and legalization of undocumented workers); Sharryn Kasimir, *Review: Organizing to Win: New Research on Union Strategies*, 27 WORK & OCCUPATIONS J. 1 (2000) (book review) (discussing UNITE Garment Worker Centers, which have offered legal assistance to immigrant workers while promoting organizing goals).

55. The U.S. Department of Labor, Bureau of Labor Statistics, estimates that in 1998 there were approximately 928,000 private household workers in the United States. See OCCUPATIONAL OUTLOOK HANDBOOK (2000-01 ed.), available at <http://www.bls.gov/oco/ocos175.htm>. In light of the prevalence of cash-only, off-the-books domestic employment, this figure likely understates the actual number of household workers.

56. 29 U.S.C. § 152(3) (2001) (stating that, for the purposes of the NLRA, "[t]he term 'employee' . . . shall not include any individual employed . . . in the domestic service of any family or person at his home").

57. See Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 52-71 (2000) (analyzing history of efforts to organize domestic workers). Domestic workers are mostly women of color, including large numbers of immigrants, and for these further reasons their workforce has been long overlooked by the predominantly white and male organized labor movement. *Id.* at 71.

58. See, e.g., HIDDEN IN THE HOME, *supra* note 4, at 7-12 (describing cases of domestic workers exploited by diplomats and international officials).

59. See, e.g., Katia Hetter, *Land of the Free, But No Holidays Off*, NEWSDAY, July 4, 2001, at A32 (discussing the Domestic Workers United project of the Committee Against Anti-Asian Violence in New York); Douglas Pasternak, *Slavery in the Capitol's Shadow*, U.S. NEWS & WORLD REP., Nov. 13, 2000, at 37-38 (discussing the work of CASA of Maryland in advocating for domestic workers exploited by international officials); Cristina

contemporary domestic worker organizing initiatives have centered on campaigns of public education and protest linked to individual litigation brought by domestic workers, typically against their former employers.<sup>60</sup> These initiatives have sought to achieve justice for individual workers, educate others about their rights, and deter future misconduct by employers.

One frustration has been the failure of the law to adequately recognize the harm experienced by these workers, mostly women and immigrant, often non-English speaking, and frequently isolated in private homes from any social or family support. Enforcing minimum wage and overtime laws cannot fully redress these workers' injuries. Pressing an ATCA claim for forced labor or involuntary servitude can fill out the narrative of why so many domestic workers remain in their employers' homes even after they learn of their legal rights. This can also lead to fuller compensation for exploited workers, and spur organizing and public education campaigns.

In addition, the pursuit of a civil claim for involuntary servitude may inspire local prosecutors to consider bringing criminal charges, which could in turn result in a restitution judgment in favor of the workers without the need for a full civil trial,<sup>61</sup> and the regularization of the workers' immigration status as a key witness in the criminal prosecution.<sup>62</sup> The

---

Riegos, *Domestic Workers Organize*, NAT'L NETWORK FOR IMMIGRANT AND REFUGEE RTS. NEWSL., Fall 1997 (relating the efforts of the Domestic Workers' Association in Los Angeles, California); Jessica Shattuck, *Nahar Alam: Fighting for the Rights of Domestic Workers*, MOTHER JONES, Oct. 1998, at 22 (describing efforts of Workers' Awaaz to organize South Asian domestic workers in New York).

60. Chisun Lee, *Trouble on the Home Front: 24 Hour Domestic Sues Upper East Side Bosses*, THE VILLAGE VOICE, July 17, 2001, at 21, (organizing around unpaid wage suit brought by "Mina Das"); Steven Kreytak, *Ex-Employee Sues Doctors Housekeeper*, NEWSDAY, Aug. 9, 2000, at A28; Tom Robbins, *Protecting Exploited Domestics*, N.Y. DAILY NEWS, Aug. 9, 1999, at 15 (concerning the same, around a suit by Gurbachan Juneja).

61. In 1996, Congress substantially revised the federal restitution statutes, 18 U.S.C. §§ 3663-3664 (2001). These statutes now provide that restitution is a mandatory element of many criminal sentences, including any sentence for a "crime of violence," 18 U.S.C. § 3663A(a)(1)(c), in the full amount of the victim's loss, § 3664(f)(1)(A), and that restitution awards are privately enforceable by victims in the same manner as any other court judgment. § 3664(m)(1)(B). Violations of the involuntary servitude statute, 18 U.S.C. § 1584 (2001), are "crimes of violence" making an award of restitution mandatory.

62. See 8 U.S.C. § 1101(a)(15)(S) (2001) (establishing S-visas for a victim or witness who shares critical, reliable information with state or federal criminal law enforcement authorities); 8 C.F.R. § 214.2(t)(1) (2001). A person may remain in S-visa status for up to three years, at which time she may apply to adjust her status to that of a legal permanent resident. 8 U.S.C. § 1255(j)(1) (2001); 8 C.F.R. § 245.11 (2001). An S-visa holder is eligible for work authorization, 8 C.F.R. § 274a.12(c)(21) (2001), and immediate family members may also be granted derivative S-visas. *Id.* at § 214.2(t)(3). See also 8 U.S.C. § 1101(a)(15)(T) (2001) (establishing visa category for victims of trafficking); 8 U.S.C. § 1101(a)(15)(U) (2001) (establishing visa category for victims of listed criminal activity who suffered "substantial physical or mental abuse" and cooperated with law enforcement).

twinning of civil damage actions with criminal prosecutions for involuntary servitude violations has, in some recent instances, yielded restitution judgments obviating a need for full-blown civil litigation by workers, as well as the regularization of their immigration status.<sup>63</sup> Ethics rules prohibit attorneys from presenting, participating in the presentation of, or threatening to present criminal charges solely for the purpose of obtaining an advantage in a civil matter.<sup>64</sup> Merely reporting criminal activity to authorities while a civil proceeding is pending does not, however, necessarily violate such rules.<sup>65</sup>

A second area in which the litigation of ATCA claims may further domestic labor initiatives is migrant farm worker advocacy, another heavily immigrant workforce that is notoriously subject to abusive employment practices. Of the few criminal prosecutions for violations of federal peonage and involuntary servitude statutes, many have involved the mistreatment of migrant agricultural workers.<sup>66</sup> Like domestic workers, agricultural workers are excluded from important labor statutes,<sup>67</sup> and the litigation of wage-and-hour and contract claims for individual workers has

---

63. The first group of immigrant workers to receive S-visas based on their participation in criminal prosecutions of their employer were a group of Thai garment workers in El Monte, California. In 1997-98, the ringleaders of a gang that had forced deaf Mexican workers to sell trinkets in the subways, airports, and other public spaces of New York and Chicago were criminally prosecuted for holding the workers in involuntary servitude. The workers were all offered "S" visas for themselves and their immediate family members. See Mirta Ojito, *U.S. Permits Deaf Mexicans, Forced to Peddle, to Remain*, N.Y. TIMES, June 20, 1998, at A1. The workers were also the beneficiaries of court-ordered restitution in the criminal cases involving the ringleaders, thereby obviating the need for a private civil damages action. See Joseph Fried, *2 Sentenced in Mexican Peddling Ring*, N.Y. TIMES, May 8, 1998, at B3 (noting that two defendants ordered to pay \$1.5 million in restitution). Finally, in *United States v. Udogwu*, No. 00-1724, 2001 U.S. App. LEXIS 19250 (2d Cir. Aug. 22, 2001), a couple was convicted of holding their domestic worker, a young Nigerian woman, in involuntary servitude and ordered to pay a quarter-million dollars in restitution, and the worker's status was regularized by INS. Interview with Christopher Meade, lead counsel for worker, Wilmer, Cutler & Pickering (Feb. 2002).

64. See, e.g., Disciplinary Rules of the Code of Professional Responsibility, 22 N.Y. COMP. CODES R. & REG. § 1200.36 (DR 7-105) (2001) (stating that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter").

65. See, e.g., N.Y.C. Assn. B. Comm. on Prof'l and Judicial Eth., Formal Op. 1995-13, 1995 WL 877125, at \*1 (pointing out that "DR 7-105(A) of tit. 22 § 1200.36 does not forbid a lawyer who is seeking civil remedies on a client's behalf against a person who has also violated a criminal statute from reporting the crime to the appropriate authorities").

66. Statement of Bill Lann Lee, Acting Assistant Attorney General, announcing the formation of Worker Exploitation Taskforce (Apr. 23, 1998) ("Most of the cases [of involuntary servitude] seem to involve undocumented workers . . . But there are also cases involving migrant workers, which do involve United States citizens."), available at <http://www.usdoj.gov/archive/ag/speeches/1998/apr2398.htm>.

67. See, e.g., 29 U.S.C. § 152(3) (2001) (excluding agricultural workers from NLRA).

developed as one significant organizing strategy.<sup>68</sup> To the extent that migrant farm workers and their advocates, like some domestic worker advocates, have already concluded that litigation of individual claims is a useful organizing strategy, the inclusion of civil ATCA claims for involuntary servitude, peonage, or forced labor, where appropriate, may also lead to fuller legal remedies, expanded opportunities to convey a more complete narrative of the workers' experience, and new organizing and public education opportunities. In addition, inclusion of ATCA claims where warranted may encourage more criminal prosecutions of involuntary servitude violations, leading to both restitution awards and lawful immigration status for the workers.

## II. THE NAALC PETITION PROCESS

Labor advocates in the United States could also make greater use of the complaint procedures authorized by the North American Agreement for Labor Cooperation ("NAALC"), even recognizing the severe limitations of the NAALC enforcement mechanism. In this Part, I sketch out the NAALC procedures, relate two little-examined instances of their useful invocation by advocates challenging labor conditions in this country, and suggest future opportunities for their deployment on behalf of working people in the United States.

### A. *The NAALC and Its Procedures*

The NAALC<sup>69</sup> is designed to promote labor rights and improve working conditions by encouraging effective labor law enforcement in the three signatory nations.<sup>70</sup> The NAALC establishes eleven "labor principles" and obligates each signatory nation to promote these principles.<sup>71</sup> In addition, the NAALC commits each nation to a range of

---

68. Thomas Collins, *Dole Sued Over Pay for Pickers*, PALM BEACH POST, Jan. 19, 2000, at 1B (detailing class action against Dole Citrus, Inc. by 500 workers); Andy Furillo, *With Union in Decline, California Farm Workers Turn Elsewhere*, SACRAMENTO BEE, May 22, 2001 (discussing the shift towards legal advocacy as an organizing strategy for California's migrant farm workers).

69. NAALC, 32 I.L.M. 1499 (entered into force Jan. 1, 1994).

70. NAALC, art. 1, 32 I.L.M. at 1503 (objectives include "improv[ing] working conditions and living standards," "promot[ing], to the maximum extent possible, the labor principles set out in Annex 1," and "promot[ing] compliance with, and effective enforcement by each Party of, its labor law").

71. NAALC, annex 1, 32 I.L.M. at 1515-16 (identifying the eleven principles as: freedom of association and right to organize; right to bargain collectively; right to strike; prohibition of forced labor; child labor protections; establishment of minimum employment standards, including minimum wage and overtime pay; elimination of employment discrimination; equal pay for equal work; prevention of occupational injuries and illnesses;

procedural guarantees in the enforcement of their domestic labor laws, such as due process, transparency of adjudications, and publication of rules and regulations.<sup>72</sup> The NAALC, emphatically, does not require any nation affirmatively to reform its labor laws.<sup>73</sup>

The NAALC creates a complaint procedure pursuant to which individual workers or labor organizations may challenge one nation's failure to enforce its domestic labor laws relating to any of the eleven NAALC labor principles.<sup>74</sup> Under the agreement, the United States, Canada, and Mexico have each established a National Administrative Office ("NAO") within its federal labor department to receive complaints, known formally as "public communications," alleging violations of the labor principles and the NAALC provisions concerning government enforcement procedures.<sup>75</sup>

The agreement creates a three-tiered complaint process. An NAO reviewing a petition related to any of the eleven labor principles must report on the case and may recommend ministerial consultations.<sup>76</sup> The subsequent ministerial consultations have generally resulted in programs of research, workshops, and public education,<sup>77</sup> and to date none of the "public communications" filed with the Canadian, Mexican, and United States NAOs has advanced beyond the ministerial consultation stage.<sup>78</sup>

When a complaint is not resolved through ministerial consultation and upon request of a consulting party, the NAALC authorizes the establishment of an Evaluation Committee of Experts ("ECE") to assess the effectiveness of a nation's labor law enforcement as challenged in a petition.<sup>79</sup> The ECE is to be constituted of outside experts, not government officials, and is charged with issuing a report and recommendations.<sup>80</sup> Of the NAALC's eleven labor principles, alleged violations of eight of them are subject to review by an ECE. Complaints charging violations of the right to organize, bargain collectively, and strike are not subject to ECE

---

worker compensation; and migrant worker protection).

72. NAALC, arts. 5-7, 32 I.L.M. at 1504.

73. NAALC, art. 2, 32 I.L.M. at 1503 ("Affirming full respect for each Party's constitution and recognizing the right of each Party to establish its own domestic labor standards . . .").

74. See generally Compa, *supra* note 3, at 7-12 (concerning the same); Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. SMALL & EMERGING BUS. L. 173, 174-80 (1999) (summarizing NAALC procedures).

75. NAALC, arts. 15, 16(3), 32 I.L.M. at 1507.

76. NAALC, art. 22, 32 I.L.M. at 1508.

77. TRADING AWAY RIGHTS, *supra* note 2, at 24-32 (reviewing NAO submissions to date).

78. *Id.* at 32.

79. NAALC, art. 23, 32 I.L.M. at 1508.

80. NAALC, arts. 23-26, 32 I.L.M. at 1508-09.



review.<sup>81</sup> No ECE has yet been convened.

Finally, complaints involving three of the eleven labor principles (enforcement of minimum wage, prohibition of child labor, and prevention of occupational injuries), if not resolved at the ECE level, may proceed to a five-member arbitration panel of outside experts.<sup>82</sup> Such a panel is empowered to issue an action plan for improving enforcement in the relevant areas.<sup>83</sup> Non-compliance with the action plan may subject a signatory nation to fines or loss of NAFTA tariff preferences for the company or sector involved in the complaint.<sup>84</sup> No complaint has reached an arbitration panel, much less resulted in non-compliance proceedings that could result in fines or a loss of tariff benefits.

*B. Domestic Uses of the NAALC: Two Illustrations from Pending Cases*

During negotiations over NAFTA, proponents of a labor side-agreement argued that the trade agreement would undermine domestic labor conditions in part because Mexico did not enforce its existing labor and employment laws.<sup>85</sup> Supporters of the trade agreement presented the NAALC as responsive to the concern about Mexican under-enforcement,<sup>86</sup> and it was widely assumed that the majority of NAALC petitions would be filed in the United States and Canada alleging violations in Mexico.<sup>87</sup> Consistent with these expectations, as of March 2002, advocates have filed twenty-four different petitions under the NAALC, of which fifteen have challenged Mexican under-enforcement of labor standards, seven have alleged violations in the United States, and two have been brought against Canada.<sup>88</sup>

---

81. The NAALC provides that only claims relating to enforcement of "occupational safety and health or other technical labor standards" are subject to ECE review, NAALC, art. 23(2), 32 I.L.M. at 1508, and defines "technical labor standards" to exclude the three core organizing rights. NAALC, art. 49, 32 I.L.M. at 1514 ("technical labor standards" refers only to labor principles (d)-(k)).

82. NAALC, arts. 27-41, 32 I.L.M. at 1509-13.

83. NAALC, art. 38, 32 I.L.M. at 1511.

84. NAALC, arts. 39-41, 32 I.L.M. at 1511-13.

85. See, e.g., Summers, *supra* note 74, at 185-86 ("The [NAALC] was insisted upon by the United States because of the perceived inadequacy of Mexican labor law and its enforcement.").

86. See e.g., TRADING AWAY RIGHTS, *supra* note 2, at 1 (stating that in the 1992 presidential campaign, candidate Bill Clinton criticized NAFTA for failure to ensure Mexico would enforce its labor standards and "sought to assuage concern within a key Democratic Party constituency—labor unions—that United States-based companies would move to Mexico to take advantage of lax enforcement of labor laws there.")

87. See Sarah Lowe, Comment, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481, 488-490 (1997) (discussing the emphasis on Mexican under-enforcement in the development of NAALC).

88. <http://www.dol.gov/dol/ilab/public/programs/nao.status.htm> (last visited March

Yet labor advocates in the United States could be making better use of the NAALC process than the filing of seven different petitions in more than eight years would indicate.<sup>89</sup> First, a NAALC petition is a relatively low-cost means to further certain domestic labor initiatives, by highlighting an alleged abuse and creating an opportunity for media advocacy and public education about the enforcement deficiency.<sup>90</sup> Second, a NAALC petition compels United States government authorities to muster a public defense of their practices, which can itself be useful in a campaign.<sup>91</sup> Third, in developing an official response, the government must measure its performance against the international standards of the NAALC, which in itself contributes to norm internalization in this country.<sup>92</sup> Fourth, to the extent NAALC petitions fail to deliver meaningful relief to the petitioners, they will nevertheless help labor advocates document results under the NAALC and strengthen arguments for enforceable labor conditions in future bilateral or multilateral trade and investment agreements.<sup>93</sup> Fifth, there is evidence that in some instances NAALC petitions have accomplished “concrete results” for workers.<sup>94</sup> Finally, in taking seriously the limited rights established by the NAALC and invoking its procedures, labor advocates here set an example for their counterparts in other nations and, by their deeds, help to refute criticism of international labor agreements as naked protectionism or improper interventions in the sovereign affairs of other states.

---

2002) (summarizing the content of twenty-three petitions); <http://www.naalc.org/english/publications/summarymexico.htm#2001> (announcing the filing of a twenty-fourth petition, Mexico NAO 01-01). Technically there have been twenty-five filings, but in one instance the identical petition was filed with the NAOs of both Canada and Mexico, TRADING AWAY RIGHTS, *supra* note 2, at 31, so I will refer to twenty-four petitions. For assessments of the earliest NAALC submissions, see Compa, *supra* note 2, at 165-76; Compa, *supra* note 3, at 12-19.

89. *Cf.* Compa, *supra* note 3, at 19 (“Experience within the structures created by the NAALC reflects unrealized potential. Only six cases were filed under the NAALC in its first three years of operation.”).

90. *Id.* (discussing the “sunlight” effect of NAALC scrutiny of domestic labor law matters).

91. See Lance Compa, *NAFTA's labour side agreement and international labour solidarity*, in PLACE, SPACE AND THE NEW LABOUR INTERNATIONALISMS (Peter Waterman and Jane Wills eds., 2001). A similar function is performed by ILO petitions. Compa, *supra* note 2, at 160 (ILO and OECD petition process establishes “an international forum for labor rights advocacy that entails an obligation to answer complaints and explain labor relations actions and policies . . . [which] creates an accountability that might otherwise be lacking”).

92. See Cleveland, *supra* note 2.

93. See Compa, *supra* note 2, at 163 (stating that “[t]he surer present course for making sound judgments about the labor side agreement is to let experience under it take shape.”).

94. Compa, *supra* note 3, at 19-20 (detailing examples of NAALC petitions positively influencing corporate and governmental behavior and helping to sustain organizing campaigns); *infra* notes 95-132 & accompanying text.

In this section I explore how two of the least-examined of the seven petitions claiming United States violations of the NAALC reveal the limited but real potential for deploying the NAALC in campaigns for working people in the United States. Both petitions are still pending, and neither has secured a direct remedy for the petitioners, in the traditional judicial sense of obtaining damages or securing injunctive relief. Nevertheless, both arise in the heartland of NAALC protections—both allege systemic government under-enforcement of domestic law regarding one of the NAALC labor principles that can proceed all the way to arbitration—and each has contributed at least modestly to broader labor campaigns now underway.

#### 1. INS-DOL agreement, NAO Mexico 9804

In 1992, the United States Department of Labor (“DOL”) and the United States Immigration and Naturalization Service (“INS”) executed a Memorandum of Understanding (“MOU”) that committed each agency to a program of information-sharing in enforcement operations.<sup>95</sup> Pursuant to this agreement, DOL pledged that when its staff reviewed employer payroll records in minimum wage and overtime investigations, the staff would also review the employer’s immigration records and “expeditiously communicate” any suspected irregularities to INS, in a manner that would “clearly and specifically identify possible violations.”<sup>96</sup>

The most immediate consequence of the 1992 MOU was to chill countless individual complaints to the DOL, lest the filing of a DOL complaint trigger an INS worksite raid.<sup>97</sup> This chilling effect occurred even though advocates and workers understood that courts<sup>98</sup> and the DOL itself<sup>99</sup>

---

95. Memorandum of Understanding Between INS and Labor Department on Shared Enforcement Responsibilities, *reprinted in* Daily Lab. Rep. (BNA) No. 113, at D-1 (June 11, 1992) [hereinafter MOU].

96. *Id.* at D-5. *See also id.* at D-3 (stating that the DOL is responsible for “prompt referral to INS of all suspected . . . violations of the [immigration] provisions against knowingly hiring or continuing to employ unauthorized workers”).

97. *See, e.g.,* Elizabeth Ruddick, *Silencing Undocumented Workers: U.S. Agency Policies Undermine Labor Rights and Standards*, 23 NLG IMMIGRATION NEWSLETTER 3 (June 1996) (reporting on interviews with labor and immigration advocates, and concluding that the MOU deterred immigrant workers from filing complaints with DOL); Gordon, *supra* note 53, at 422 (stating the same). *See also* Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L. J. 2179, 2182 (1994) (describing that immigrant workers’ fear of deportation deters reporting of sweatshop conditions).

98. *See, e.g.,* *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (holding that Fair Labor Standards Act (“FLSA”) applies to all covered workers regardless of immigration status); *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) (holding the same); *Contreras v. Corinthian Vigor Ins. Brokerage*, 25 F. Supp. 2d 1053 (N.D. Cal. 2000) (holding the same).

agreed that the wage and hour laws apply to all covered workers regardless of immigration status.

The 1992 MOU thus served to depress the terms and conditions of employment for millions of people, both immigrants receiving illegally low wages and other workers competing with them. Because few low-wage workers could afford private attorneys, most are not represented by unions, and almost no legal services office handles low-wage worker cases,<sup>100</sup> barring immigrants from seeking the DOL's assistance was tantamount to denying them a remedy for the federal labor law violations. Moreover, the effect of the MOU was intensified in states without a state minimum wage law or where the state law sets a minimum wage below the federal standard.<sup>101</sup>

The 1992 MOU also undermined DOL enforcement generally. The agency is heavily dependent on individual reporting in carrying out its statutory enforcement duties:

For weighty practical and other reasons, [in enacting the FLSA] Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.<sup>102</sup>

In the years after the 1992 MOU was adopted, reform efforts by labor, immigrant, and civil rights advocates were sporadic and largely uncoordinated. Most groups simply had too many other, more urgent issues to press with decision-makers. Even sympathetic members of the Clinton Administration tended to focus on other labor and immigration matters, especially after Congress passed three major anti-immigrant statutes in five months in 1996.<sup>103</sup> Outside government, there was

99. See, e.g., *Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483, 1485 (10th Cir. 1985) (involving a DOL action enforcing FLSA on behalf of undocumented workers).

100. Gordon, *supra* note 53, at 422.

101. Currently, seven states have no minimum hourly wage and four states set the minimum wage below the federal hourly amount. U.S. Dept. of Labor, *Minimum Wage Laws in the States*, available at <http://www.dol.gov/dol/esa/public/minwage/america.htm> (last modified Nov. 2001).

102. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (describing the FLSA).

103. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 401-443, 110 Stat. 1214, 1258-81 (1996) (amending immigration statutes regarding the deportation of non-citizens with criminal convictions); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400-435, 110 Stat. 2105, 2260-76 (restricting immigrant access to welfare benefits); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (enacting

widespread sentiment that internal INS opposition to amending the MOU had combined with general bureaucratic inertia to frustrate reform.

In late 1997, a group of Yale Law students formed a Workers' Rights Project and decided to try to use the NAALC to attack the MOU.<sup>104</sup> Their objectives included rallying advocates around the issue, pressuring the Clinton Administration to reform the policy, and testing the limits of the NAALC process. The students knew that at the time only one NAALC petition had been filed challenging labor abuses in the United States,<sup>105</sup> and that no petition had yet targeted an official United States policy or alleged a violation of one of the three NAALC principles that could proceed to arbitration.<sup>106</sup>

---

draconian changes to immigration laws).

104. Graham Boyd was advisor to the Workers' Rights Project and counsel on the NAALC petition. The principal students coordinating work on the petition were Shayne Stevenson, Adriaan Lanni, and Daphne Keller.

105. See Mexico NAO Report on Public Submission 95-01, § I-7 (1995), *available at* <http://www.dol.gov/dol/ilab/public/media/reports/nao/9501.htm> (challenging the closing of a Sprint Co. subsidiary shortly before union representation election and alleging systemic under-enforcement of right to organize). The National Administrative Office ("NAO") of Mexico recommended ministerial consultations, which resulted in an agreement by the United States Department of Labor to hold a public forum and to commission a study of the effect of rapid plant closings. See *id.* Ministerial Consultations—Submission 95-01 (Sprint Case) Agreements on Implementation (1996), *available at* [www.dol.gov/dol/ilab/public/media/reports/nao/minagreemt9501.htm](http://www.dol.gov/dol/ilab/public/media/reports/nao/minagreemt9501.htm). Under the NAALC, no further proceedings are authorized on a petition regarding the right to organize. For an early analysis of this petition, see Lowe, *supra* note 87. As for the campaign, the National Labor Relations Board concluded that the Sprint plant closure was motivated by anti-union animus and ordered relief, but the U.S. Court of Appeals for the D.C. Circuit held that the Board's order was not supported by substantial evidence and set it aside. *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1283 (D.C. Cir. 1997).

106. Since the Sprint case, five petitions in addition to the MOU complaint have been filed against the United States. See Mexico NAO Submission 98-01, *available at* <http://www.dol.gov/dol/ilab/public/media/reports/nao/mxnao9801.htm> (alleging the under-enforcement of various NAALC principles arising out of an organizing campaign at Solec, Inc., a manufacturer of solar panels); Mexico NAO Submission 98-02, *available at* <http://www.dol.gov/dol/ilab/public/media/reports/nao/mxnao9802.htm> (involving a broad challenge to the under-enforcement of labor standards as to migrant apple workers in Washington State); Mexico NAO Submission 98-03, *available at* <http://www.dol.gov/dol/ilab/public/media/reports/nao/mxnao9803.htm> (alleging the "ineffective enforcement of labor law at the DeCoster Egg Farm in Turner, Maine"); Canada NAO Public Submission 99-01, *available at* <http://www.dol.gov/dol/ilab/public/media/reports/nao/submission9901.htm> (challenging application, interpretation, and enforcement of NLRA provisions relating to labor-management cooperative committees in non-union workplaces); Mexico NAO Submission 01-01, *available at* <http://www.naalc.org/english/publications/summarymexico.htm#2001> (challenging extraordinary delays in the New York State Workers Compensation Board adjudication of claims) (summarized at The last of these was recently filed. The second to last was not accepted for review by NAO Canada on the grounds that the petitioners had not established United States under-enforcement. The U.S. and Mexico executed a Ministerial Agreement on the other three petitions, in which the U.S. DOL agreed to hold government-to-government talks on

The Yale students developed theories that the MOU led to systemic under-enforcement of United States wage and hour laws in violation of the NAALC, gathered statements from immigrant and labor advocates regarding the MOU's chilling effect, and drafted the petition. It was simultaneously filed with the NAOs in Canada and Mexico shortly after Labor Day in 1998, on behalf of twenty groups representing a broad coalition of unions, immigrant rights organizations, and community-based labor groups.<sup>107</sup> The filing received modest press coverage.<sup>108</sup> In October 1998, a community-based organization in California released a national report condemning the 1992 MOU and endorsing the NAALC petition,<sup>109</sup> prompting some further press coverage.<sup>110</sup>

Meanwhile, a significant development far from the grassroots NAALC effort had increased prospects for revising the MOU. In the summer of 1998, Maria Echaveste, a former Wage and Hour Administrator at DOL with an extensive background in immigrant labor issues and a commitment to reforming the 1992 MOU, was promoted to Deputy Chief of Staff to the President.<sup>111</sup> In this position, Echaveste exercised the authority to overcome the bureaucratic inertia impeding reform of the MOU.<sup>112</sup>

In November 1998, the Mexico NAO accepted the petition challenging the MOU. Shortly thereafter, the INS and the DOL announced that the agencies had entered into a new cooperation agreement, superseding the 1992 MOU. In the new MOU, the agencies reversed course and declared that in "complaint-driven" investigations the DOL

---

enforcement of the applicable NAALC principles and to sponsor public forums on migrant agricultural issues. Agreement on Ministerial Consultations Mexican NAO Submissions 98-01, 98-02, & 98-03 (2000), available at <http://www.dol.gov/dol/ilab/public/media/reports/nao/minagreemt9801-9802-9803.htm> [hereinafter Agreement on Ministerial Consultations]. See also Paul Lall, Note, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 COLUM. HUM. RTS. L. REV. 597 (2000) (analyzing a Washington State apple worker petition and arguing U.S. treatment of migrant farmworkers violates the NAALC); *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 341-42 n.15 (1st Cir. 2000) (dismissing labor claims by the nation of Mexico on behalf of Mexican workers at DeCoster for lack of standing and stating that the remedy for Mexico's concerns best secured through NAALC proceedings).

107. Mexico NAO No. 9804 (1998); Canada NAO No. 9802 (1998).

108. See Kevin McCoy, *Suit Blasts Feds on sweatshops*, N.Y. DAILY NEWS, Sept. 18, 1998, at 5 (describing the petition as an "unusual lawsuit" filed to challenge "federal government policy that protects sweatshop operators").

109. *Portrait of Injustice: The Impact of Immigration Raids on Families, Workers, and Communities* (1998).

110. See, e.g., *Immigrant Rights Group Voices Concern About Link Between INS Raids, Sweatshops*, Daily Lab. Rep. (BNA) No. 199, at A-7 (Oct. 15, 1998) (describing NAALC petition).

111. Bob Dart, *From Migrant Worker She Rose to Key White House Role*, COX NEWS SERVICE, May 27, 1999.

112. Interview with Muzaffar Chishti, former Director, UNITE Immigration Project (Mar. 2002).

would *not* inspect employer immigration records or report suspected violations to the INS.<sup>113</sup> The DOL press release stated that a key purpose of the revision was “to allay fears in the immigrant community that prevent complaints about labor abuses by unscrupulous employers from being filed.”<sup>114</sup> The DOL’s own announcement of the new MOU noted that the Mexico NAO had recently accepted the Yale petition.<sup>115</sup>

Did the NAALC petition play any role in finally persuading INS and DOL to revise the MOU? Although the MOU’s amendment has been attributed to the filing of the NAALC petition,<sup>116</sup> this overstates the case. Despite the DOL’s evident sensitivity to developments in the NAALC proceeding,<sup>117</sup> in terms of a direct causal relationship, the NAALC petition probably had little effect on the discussions within the Administration.<sup>118</sup>

But the development and filing of the NAALC petition has accomplished several objectives. By offering a new (if limited) strategy, the NAALC petition crystallized concerns about the MOU and elevated the issue’s profile among advocates at the grassroots and national levels. It may have highlighted the MOU issue within the Labor Department.<sup>119</sup> It also signaled that eventually the DOL and the INS would have to explain their information-sharing arrangement in an international forum. Moreover, the NAALC petition may yet afford advocates some opportunity to participate in shaping the implementation of the 1998 MOU, and may even play some role in the current wide-ranging bilateral discussions of the treatment of Mexican nationals in the United States.<sup>120</sup>

---

113. *Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor*, Nov. 23, 1998, reprinted in *Daily Lab. Rep. (BNA)* No. 227, at E-10, 11 (Nov. 25, 1998). See Deborah Billings, *Complaint-Driven Workplace Inspections No Longer Will Include Immigration Checks*, *DAILY LAB. REP. (BNA)* No. 227, at AA-1 (Nov. 25, 1998).

114. ESA Press Release, U.S. Dep’t of Labor, *Labor Department and INS Sign Memorandum of Understanding to Enhance Labor Standards Enforcement to Aid U.S. Workers* (Nov. 23, 1998), available at <http://www.dol.gov/opa/media/press/esa/esa98474.htm>.

115. *Id.* (stating that objections to 1992 MOU “were raised in a complaint filed by some twenty U.S. groups . . . under the [NAALC] . . . Mexico recently accepted the complaint for ‘formal NAO review under the NAALC,’ a Labor Department spokesman said.”).

116. See, e.g., Arthurs, *supra* note 7, at 287 n.51.

117. See *supra* note 114.

118. Echaveste believes the NAALC petition had no influence at all on the 1998 MOU revision. Interview with Maria Echaveste, former Deputy Chief of Staff to the President (Mar. 2002). Doris Meissner, Commissioner of the Immigration and Naturalization Service at the time the MOU was revised, does not recall being aware in 1998 that a petition had even been filed. Interview with Doris Meissner, former INS Commissioner (Feb. 2002).

119. See *supra* note 114.

120. This is because the 1998 revisions alone did not render moot the NAALC submission. Following the revisions, the Mexico NAO propounded a series of questions to the NAALC petitioners and to the United States NAO. After reviewing the responses in October 2000 the Mexico NAO concluded that a live controversy remained and

## 2. New York Workers' Compensation Board Delays, NAO Mexico 0101

As in other states, New York law provides that workers who are injured or become ill in the course of employment may receive compensation for medical expenses and lost income by filing a claim with the Workers' Compensation Board ("WCB"). The injured worker's claim is adjudicated by an administrative law judge and subject to administrative and judicial review.<sup>121</sup> When the New York legislature created the workers' compensation system, it extinguished common-law tort actions for injured workers. Instead, by requiring employers to arrange for no-fault insurance coverage, the new WCB was "designed to provide a swift and sure source of benefits to the injured employee or to the dependents of the deceased employee."<sup>122</sup>

In New York, the system has failed. Extraordinary delays in the WCB's adjudication of claims by sick and injured employees mock the statute's promise and leave many injured and destitute workers with the choice between accepting a nominal settlement or facing years of adjournments and appeals. As the New York State Bar Association recently concluded, WCB delays are widespread and "are being used by insurance carriers and employers to obtain unfair advantage over claimants."<sup>123</sup>

In the late 1990s, a small group of community labor organizations in New York City began to work to improve health and safety conditions in low-wage workplaces and better to assure that injured workers receive fair and prompt compensation.<sup>124</sup> When meetings with WCB officials, including the state chairman, failed to yield improvements in the timely processing of claims, these groups launched "It's About TIME!: Campaign for Workers' Health and Safety," a campaign of vigorous public demonstrations, worker organizing, media advocacy, coalition-building, and legislative reform.<sup>125</sup>

---

recommended ministerial consultations, a request that the U.S. NAO formally accepted in January 2002. See <http://www.dol.gov/dol/ilab/public/programs/nao/status.htm#iib5>.

121. See N.Y. WORKERS' COMPENSATION LAW §§ 1 *et seq* (McKinney 1984).

122. *O'Rourke v. Long*, 391 N.Y.S.2d 553, 556 (NY 1976).

123. New York State Bar Association, Report of the Special Committee on Administrative Adjudication, at 92 (Oct. 1999). See also *id.* ("It is clear that the review delays [in WCB proceedings] described in the 1988 Task Force Report are still occurring . . . The threat of a long contested claim proceeding followed by a long review process is potent enough to force many claimants to settle for less than they might otherwise be entitled to receive.").

124. These organizations included Chinese Staff & Workers Association, National Mobilization Against Sweat Shops ("NMASS"), and Workers' Awaaz.

125. See Mexico NAO Submission 01-01, ex. A, Affidavit of Chinese Staff & Workers Association, at ¶ 16 (copy on file with author).



As one aspect of their efforts to publicize the extraordinary delays at the New York WCB and to hold the Board's leadership accountable for those delays, a delegation of injured workers from "It's About TIME!" traveled to Mexico City in October 2001 to file a NAALC petition with the Mexico NAO.<sup>126</sup> The petition, NAO Mexico Submission 01-01, alleges that the New York WCB violates the NAALC procedural guarantee that labor proceedings not "entail . . . unwarranted delays."<sup>127</sup> The delays, the petition maintains, contravene two of the NAALC's eleven labor principles, those relating to compensation for and prevention of occupational injury and illness.<sup>128</sup> Significantly, a violation of the latter principle is one of the few that can proceed to full arbitration under the terms of the NAALC. The Mexico NAO promptly accepted jurisdiction over the petition.<sup>129</sup>

The "It's About TIME!" petitioners have been successful in using the petition in their media and political advocacy. There has been a significant amount of press coverage of the case.<sup>130</sup> In addition, the NAALC petition helped the campaign to press for federal intervention to redress the state workers' compensation board delays when the campaign was invited to testify at a Senate subcommittee hearing on workplace safety and health.<sup>131</sup> Most importantly, filing the petition invigorated the organizing campaign and energized its on-going education and outreach efforts on the abuses of the New York workers' compensation system.<sup>132</sup> As the Mexico NAO begins its investigation of the petition, there may be further opportunities for the members of It's About Time to engage in public education and legislative and media advocacy, and the WCB leadership may yet be compelled to justify the mammoth delays in its system.

---

126. Graham Gori, *World Briefing: The Americas: Mexico: Suit Against New York*, N. Y. TIMES, Oct. 25, 2001, at A10.

127. NAALC, art. 5, 32 I.L.M. at 1504, available at <http://www.naalc.org/english/publications/summarymexico.htm#2001> (summarizing the submission).

128. *Id.*

129. *Id.*

130. See *supra* note 124. See also Thomas Adcock, *Workers File NAFTA Petition in Mexico; State Workers' Compensation Board Targeted*, N.Y. L. J., Nov. 9, 2001, at 16; Daniel Hays, *Mexico to Probe N.Y. Workers' Comp Board*, NAT'L UNDERWRITER PROPERTY AND CASUALTY-RISK & BENEFITS MGMT, Dec. 17, 2001, at 20; Thomas Maier, *Mexico To Probe Immigrant Claims; Workers say NY denied pleas for compensation*, NEWSDAY, Dec. 4, 2001, at A12.

131. Interview with Sameer Ashar, NYU Immigrant Rights Clinic, lead counsel for petitioners in Mexico NAO 01-01 (Feb. 2002).

132. *Id.* See also <http://www.nmass.org/nmass/wcomp/nafta-what.html> (NMASS had "decided to file the NAFTA petition to publicize how workers' human rights are being violated here in New York State . . . we want to put pressure on Governor Pataki and the New York State Legislature. We want them to see the importance of protecting the health and safety of all workers").

C. *Using the NAALC to Enforce International Labor Norms*

The NAALC challenges to the INS-DOL MOU and to delays at the New York Workers' Compensation Board offer several useful lessons for labor advocates in the United States. First, the core labor-rights criticisms of the NAALC are correct. The labor side agreement creates almost no binding obligations on the signatory nations, apart from the commitment to enforce their existing labor laws and to guarantee certain minimal due process-type rights in administrative proceedings.<sup>133</sup> The NAALC does not directly bind private employers. The agreement's enforcement procedures are cumbersome and foreclose meaningful relief except as to violations of the three principles that could theoretically lead to arbitration and sanctions.<sup>134</sup> In short, the NAALC does not limit abusive practices by employers, does not require the signatory countries to upgrade their domestic labor standards, and threatens lax government enforcement with only symbolic penalties.

On the other hand, a NAALC petition can help achieve limited goals. The NAALC petitions that appear to be attacks on private employers dressed up as condemnations of government action fit less well with the NAALC scheme than campaigns truly aimed at government practices. Where the purpose of a labor initiative is in fact to reform an official policy such as the INS-DOL MOU, or an informal but systemic practice, such as delays at the New York WCB, a petition can serve to focus advocacy efforts, provoke media attention to an enforcement deficiency, and compel a government response.<sup>135</sup> In these ways a NAALC petition can contribute directly to a political campaign.

A NAALC petition can potentially serve organizing and public education goals as well. It can be a platform for individual workers to communicate their experiences to others, through written declarations included with a petition or oral statements at related press, community, and political events.<sup>136</sup> That a NAALC petition is not controlled by formal rules

---

133. Compa, *supra* note 3, at 7.

134. After detailing the fate of another NAALC petition, Clyde Summers assessed the NAALC thus: "The mouse brought forth by the mountain's labors was an agreement by the secretaries of labor to hold three seminars, study Mexican labor law, and schedule meetings." Summers, *supra* note 74, at 178 (analyzing U.S. NAO No. 94-03, arising from Sony Corp.'s labor abuses at a maquiladora plant in Nuevo Laredo, Mexico and the Mexican government's failure to enforce various labor laws at the factory). For a more positive account of the NAALC's potential, see Compa, *supra* note 91.

135. Cleveland, *supra* note 12, at 1546 ("[I]t is clear that the NAALC's primary contribution to the transnational labor rights regime to date has been to create a forum for regional public awareness of labor rights issues."); Summers, *supra* note 74, at 187 ("The submission process raises to public view and places in sharp focus the too easily ignored failures to live up to [the NAALC] standards."); Compa, *supra* note 91.

136. Interview with Sameer Ashar, *supra* note 131.

of evidence, procedure, or judicial precedent can enable broad worker participation in preparing, drafting, and “litigating” a petition. Not insignificantly, filing and prosecuting a NAALC petition is a relatively low-cost form of advocacy that need not involve substantial expenditures of time or money.

Finally, filing a NAALC petition can improve awareness of international labor instruments and their shortcomings among workers, advocates, press, and government officials. This, in turn, will both promote the internalization of international labor norms in this country and set an example for labor advocates in other countries of respect for those international obligations accepted by our nation, while at the same time it will highlight gaps in current domestic and international labor law.<sup>137</sup>

A few examples of possible uses of the NAALC process to contribute to labor campaigns directed at United States government policies such as the INS-DOL MOU or New York workers’ compensation delays may further illustrate these points. First, where a government agency expressly fails to carry out a statutory duty, a NAALC petition might be of use in a movement to force official action. For example, in 1998 Congress established “whistleblower” protections for H-1B visa holders<sup>138</sup> who complain of labor abuses,<sup>139</sup> specifically directing the INS and the DOL to safeguard the immigration status of H-1B workers who file labor complaints.<sup>140</sup> The agencies have yet to issue regulations implementing the statutory command, however, or to otherwise establish a program to assure the immigration status of H-1B whistleblowers.<sup>141</sup> Another example of a NAALC petition potentially contributing to a political campaign to compel government officials to carry out a law are the efforts by labor advocates in St. Louis and Buffalo to overcome mayoral refusals to implement municipal “living wage” ordinances.<sup>142</sup> Labor and community advocates

---

137. See, e.g., Lall, *supra* note 106 (analyzing weaknesses in domestic labor law coverage of migrant farmworkers and urging recourse to NAALC); Summers, *supra* note 74, at 186 (NAALC petitions challenging United States practices cannot improve labor standards but “can ‘serve the purpose of deflating our hubris and focusing our attention on our pervasive failure to effectively enforce our own labor laws’”).

138. The H-1B visa program offers temporary employment visas to specialized workers. See 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2001).

139. American Competitiveness and Workforce Improvement Act of 1998, Title IV, § 413(a), Pub. L. No. 105-277, 112 Stat. 2681 (Oct. 21, 1998), (codified at 8 U.S.C. § 1182(n)(2)(C)(iv) (2001)) (providing that an employer may not “intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against [such] employee” because H-1B visa-holder discloses violation of H-1B rules or cooperates with investigation).

140. 8 U.S.C. § 1182(n)(2)(C)(v) (2001).

141. See 64 Fed. Reg. 649 (Jan. 5, 1999) (“[DOL] and INS are working in close cooperation to develop this authorization procedure.”).

142. See *Missouri ex rel. St. Louis Living Wage Campaign v. Harmon*, Cause No. 004-

leading the political and legal campaigns to compel municipal compliance with "living wage" ordinances could also challenge the local defiance as violative of the NAALC.<sup>143</sup>

Second, filing a NAALC petition may be useful in campaigns directed at violations of the NAALC's procedural obligations.<sup>144</sup> For example, extraordinary delay in the adjudication of labor complaints is subject to attack as violative of the NAALC guarantee that government proceedings "do not entail . . . unwarranted delays."<sup>145</sup> Certainly, agencies notorious for delay, such as the Occupational Safety and Health Administration ("OSHA") and state worker compensation boards would seem liable to challenge under the NAALC.

Third, filing a NAALC petition may be helpful in efforts to challenge contradictory policies in which one agency, like the INS or the Social Security Administration ("SSA"), pursues an enforcement strategy that directly undermines labor law enforcement. One example is the INS-DOL MOU challenged in NAO Mexico No. 98-04, but there are others. For instance, there is evidence that the INS is regularly, and likely willingly, used by unscrupulous employers to retaliate against their immigrant workers,<sup>146</sup> despite internal INS rules limiting the agency's involvement in labor disputes.<sup>147</sup> INS violations of its own rules regarding involvement in labor disputes undoubtedly deters immigrant workers from reporting illegal

---

02640 (St. Louis City Circ. Ct.) (filed December 2000) (alleging municipal failure to implement an ordinance); *Coalition for Econ. Justice v. City of Buffalo*, I-2001-6163 (Sup. Ct. Erie Co.) (filed July 11, 2001) (same).

143. The NAALC is unquestionably binding on state and local authorities as well as the federal governments that are the formal signatories to the instrument. The Mexico NAO has twice accepted jurisdiction over petitions challenging a state or local government's non-compliance with the NAALC. *See* NAO Mexico No. 98-02 (alleging that Washington State failed to safeguard the rights of apple workers, *inter alia*, to organize, to the minimum wage, and to be protected from occupational safety and health hazards, as guaranteed by state law); *Agreement on Ministerial Consultations*, *supra* note 106, at 2 (providing that the U.S. and Mexico agreed to an action plan that includes further exchanges regarding "the role of federal and state agencies in the protection and promotion of the rights of migrant workers in the United States") (emphasis added); <http://www.naalc.org/english/publications/summarymexico.htm#2001> (providing that the Mexico NAO accepts jurisdiction over Submission 01-01, alleging delay in state workers' compensation system).

144. *See* NAALC, "Procedural Guarantees," art. 5, 32 I.L.M. at 1503, 1504.

145. NAALC, art. 5(1) (d), 32 I.L.M. at 1504.

146. *See, e.g.,* *Montero v. INS*, 124 F.3d 381 (2d Cir. 1997) (upholding a deportation order against labor activist whose employer requested INS raid in retaliation for organizing activities); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (describing efforts by employer to retaliate against worker who filed overtime complaint by contacting the INS and Social Security Administration).

147. *See* INS Operating Instruction 287.3a (establishing additional procedural requirements prior to a INS worksite raid where INS suspects it may be involved in labor dispute), *reprinted in* 74 Interpreter Releases 199 (Jan. 20, 1997), *redesignated as* § 33.14(h), INS Special Agent Field Manual (Apr. 28, 2000).

activity to labor and employment agencies and, therefore, like the former INS-DOL MOU, leads to the systemic under-enforcement of labor standards.<sup>148</sup> Similarly, recent revisions to the “no-match” enforcement program of the SSA, a longstanding SSA initiative to link employer payroll withholdings to individual worker accounts when the employer’s filings do not “match” the SSA’s own computer records, have prompted employers to threaten or discharge workers, despite SSA advisories against adverse employment actions.<sup>149</sup>

### III. CONCLUSION

The challenges globalization poses for workers and their advocates are many, as are the demands on the limited resources of working people and their organizations. There is a manifest need to support cross-border organizing initiatives and to insist that bilateral and multilateral trade and investment agreements contain meaningful and enforceable labor protections. On the other hand, it may, at times, be difficult to defend expending organizing time and worker monies on international efforts that appear to offer, at best, indirect benefits in the distant future.

Strategies to use international labor law in the service of United States domestic labor campaigns can help to resolve the tension between the need for unions and other labor advocates to participate in international responses to globalization and the competing need to devote scarce resources to issues of immediate concern to workers in this country. Enforcement of international labor laws in the United States can play a useful role in deepening the engagement of the U.S. labor movement in international issues, in a manner that is also justifiable in terms of the more direct, short-term interests of workers in this country. Ironically, the widespread mistreatment of immigrant workers in the United States provides a number of opportunities to achieve these objectives. Such strategies are, of course, not a full response to the pressures globalization places on working people, but in combination with other efforts, these underutilized approaches can eventually be of substantial benefit to workers in this country and abroad.

---

148. See Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, in CROSS-BORDER HUMAN RESOURCES, LABOR AND EMPLOYMENT ISSUES, PROCEEDINGS OF THE 54TH ANNUAL CONFERENCE ON LABOR (Samuel Estreicher ed., forthcoming 2002) (stating that an INS violation of internal rules restricting agency involvement in labor disputes undermines labor rights); Ruddick, *supra* note 97, at 10-12 (stating the same).

149. National Immigration Law Center, *Basic Information about SSA ‘No-Match’ Letters*, at 2 (Feb. 2000) (relating instances where employers fired workers on SSA “no-match” list or used letters to thwart labor organizing campaign).

